

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2005-CA-01750-COA**

**HELEN MAY, INDIVIDUALLY AND ON BEHALF  
OF ALL WRONGFUL DEATH BENEFICIARIES OF  
JEFFERSON DAVIS MAY, DECEASED**

**APPELLANT**

**v.**

**PULMOSAN SAFETY EQUIPMENT  
CORPORATION, AMERICAN OPTICAL  
CORPORATION, EMPIRE ABRASIVE EQUIPMENT  
CORPORATION, LOUIS M. GERSON COMPANY,  
INC., MINE SAFETY APPLIANCES COMPANY,  
MISSISSIPPI VALLEY SILICA COMPANY, INC.,  
PAULI & GRIFFIN COMPANY, INC., AND  
SCHRAMM, INC.**

**APPELLEES**

DATE OF JUDGMENT:	6/5/2005
TRIAL JUDGE:	HON. MIKE SMITH
COURT FROM WHICH APPEALED:	PIKE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LANCE P. BRADLEY R. ALLEN SMITH, JR. CRYMES G. PITTMAN MARK W. DAVIS
ATTORNEYS FOR APPELLEES:	RANDI PERESICH MUELLER RONALD G. PERESICH W. MARK EDWARDS JOHANNA M. MCMULLAN CLYDE L. NICHOLS, III BLAYNE T. INGRAM CHARLES R. WILBANKS, JR.
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
TRIAL COURT DISPOSITION:	MOTION FOR SUMMARY JUDGMENT GRANTED.
DISPOSITION:	AFFIRMED: 02/06/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE MYERS, P.J., GRIFFIS AND BARNES, JJ.**

**GRIFFIS, J., FOR THE COURT:**

¶1. Helen May, individually and on behalf of all wrongful death beneficiaries of Jefferson Davis May, brings this appeal of a summary judgment entered in favor of the Defendants, Pulmosan Safety Equipment Corporation, American Optical Corporation, Empire Abrasive Equipment Corporation, Louis M. Gerson Company, Inc., Mine Safety Appliances Company, Mississippi Valley Silica Company, Inc., Pauli & Griffin Company, Inc., and Schramm, Inc., among others (collectively referred to as the “Appellees”). On appeal, May argues that the trial court erred in barring her cause of action before it came into being, and that the statute of limitations defense does not challenge the merits of the underlying cause of action. We find no error and affirm.

#### FACTS

¶2. On March 18, 2002, Jefferson Davis May (“J.D.”) sued the Appellees for personal injuries he sustained as a result of being exposed to silicon dust. The Appellees were manufacturers of sand and various safety equipment used by J.D. in his career as a sandblaster. J.D. contracted silicosis sometime in the 1970s as a result of his exposure during the period from 1953 to 1968.

¶3. On May 6, 2002, J.D. died of silicosis. His wife Helen was substituted as the plaintiff, both individually and on behalf of J.D.’s wrongful death beneficiaries, on April 8, 2004. Since this was a mass tort complaint, it already alleged wrongful death among the claims against Appellees.

¶4. The trial court granted summary judgment based on its finding that J.D.’s claims for personal injuries were time-barred, and as a consequence, Helen’s wrongful death claim was time-barred as well.

#### STANDARD OF REVIEW

¶5. This Court employs a *de novo* standard of review of a lower court’s grant or denial of summary judgment and examines all the evidentiary matters before it—admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *McMillan v. Rodriguez*, 823 So. 2d 1173,

1176-77 (¶9) (Miss. 2002) (citations omitted). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Id.* at 1177 (¶9). If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his or her favor. *Id.* Issues of fact sufficient to require reversal of a summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. *Id.*

### ANALYSIS

*I. Did the trial court err in barring Helen's claim before it came into being?*

*II. Is the statute of limitations defense procedural or substantive?*

¶6. Although listed as separate issues, these issues actually contemplate a sole question—when does a claim for wrongful death accrue. Therefore, we will address these issues together.

¶7. Helen argues the trial court erred because it held that her wrongful death claim expired before J.D. died. The Appellees argue that the trial court was correct because a wrongful death claim is derivatively subject to any defenses that would apply against the decedent.

¶8. “[A] wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death.” *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (¶12) (Miss. 2006). The wrongful death claim accrues when the claim for the underlying wrongful conduct accrues. *Id.* at (¶¶12-13). This limitations period may be tolled by the discovery rule. *Sarris v. Smith*, 782 So. 2d 721, 724 (¶11) (Miss. 2001). For example, in *Jenkins*, the plaintiff brought a claim for the negligent wrongful death of a nursing home patient. *Jenkins*, 933 So. 2d at 923 (¶2). The tortious conduct occurred December 31, 1999. *Id.* at (¶3). As a result of this conduct, the patient died on October 4, 2001. *Id.* at (¶2). The wrongful death action was filed December 31, 2002. *Id.* The supreme court held it was time-

barred because it was filed more than three years after December 31, 1999, the date the tortious conduct occurred. *Id.* at (¶13).

¶9. J.D. was diagnosed with silicosis in 1971. Viewing the evidence in the light most favorable to the Mays, J.D. discovered the Appellees' tortious conduct, if any, by March 11, 1997. A medical record on this date is the first mention in the record that J.D.'s silicosis was a result of his job as a sandblaster. Therefore, J.D.'s claim against the Appellees began to run March 11, 1997. J.D.'s complaint, filed March 18, 2002, included claims for intentional and negligent wrongful death. Helen and J.D.'s other wrongful death beneficiaries were substituted as parties in April of 2004. Thus, the wrongful death claim against the Appellees is time-barred. The statute of limitations expired before this litigation was commenced. Miss. Code Ann. §§ 15-1-35; 15-1-49 (Rev. 2003).

¶10. In the separate opinion, Judge Chandler cites *Gentry* for the proposition that “*Jenkins* did not alter the rule that a wrongful death action does not accrue until the death occurs.” We are of the opinion that this is precisely the point that the Supreme Court held when in *Jenkins* the Court overruled *Gentry*. We interpret the separate opinion to say that there remains the possibility of a restart to the limitations period so long as the injured person dies within the limitations period, but there is no such possibility of a restart to the limitations period if the injured person dies outside of the limitations period. Using the parties of this case as an example, if J.D. had died one day before the end of the limitations period, the principle offered by the separate opinion would allow an additional three years for J.D.'s wrongful death beneficiaries to pursue the claim. If J.D. had died one week after the limitations period expired, his wrongful death beneficiaries would be barred by the statute of limitations. We do not interpret *Jenkins* to allow this distinction. *See Thiroux v Austin*, 749 So. 2d 1040, 1042 (¶4) (Miss. 1999) (“wrongful death action . . . is limited by the statute of limitations applicable to the tort resulting in the wrongful death”). *See also Lee v. Thompson*, 859

So. 2d 981 (Miss. 2003) (statute of limitations in wrongful death action subject to limitations period of underlying tort). Indeed, we do not recognize the “confusion” claimed by the separate opinion. Instead, we are of the opinion that the Supreme Court settled this issue in *Jenkins*.

¶11. We find no error. The summary judgment is affirmed.

**¶12. THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY IS AFFIRMED. ALL COSTS OF APPEAL ARE ASSESSED TO THE APPELLANT.**

**MYERS, P.J., BARNES, ISHEE AND ROBERTS, JJ., CONCUR. IRVING, J., CONCURS IN RESULT ONLY. CHANDLER, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., LEE AND MYERS, P.JJ. AND IRVING, J. CARLTON, J., NOT PARTICIPATING.**

**CHANDLER, J., SPECIALLY CONCURRING:**

¶13. I agree with the majority that Helen May's wrongful death claim is time-barred. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (¶12) (Miss. 2006) has removed any doubt that a wrongful death claim is subject to the statute of limitations associated with the underlying wrongful conduct that allegedly caused the death. I write separately for the purpose of briefly addressing language employed by the majority that, in my opinion, is imprecise and potentially confusing.

¶14. Citing *Jenkins*, the majority states that “[t]he wrongful death claim accrues when the claim for the underlying wrongful conduct accrues.” With respect to the majority, that statement is not an accurate summation of the cited language from *Jenkins*. The cited paragraphs state:

Recognizing that, in *Thiroux*, we should have specifically overruled *Gentry*, we do so now, and hold that the statute of limitations on bringing a wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death.

The three year statute of limitations applicable to negligence actions is codified in Miss. Code Ann. Section 15-1-49 (Rev. 2003). We hold that *Jenkins* may not rely on any act of negligence which allegedly occurred three years before the complaint was filed on December 31, 2002. Claims—whether for negligence or wrongful death—that were not brought within the applicable statute of limitations are barred by that statute.

*Id.* at 926 (¶¶12-13). The language relied upon by the majority never states that the wrongful death cause of action accrues at the time that the claim for the underlying wrongful conduct accrues. I believe that it is unwise for this Court to construe *Jenkins* to stand for that proposition.

¶15. In my opinion, *Jenkins* did not alter the rule that a wrongful death action does not accrue until the death occurs. *Gentry v. Wallace*, 606 So. 2d 1117, 1121 (Miss. 1992). A cause of action accrues when it "comes into existence as an enforceable claim, that is, when the right to sue becomes vested." *Gentry*, 606 So. 2d at 1121 (citing *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 706 (Miss. 1990)). In *Long v. McKinney*, 897 So. 2d 160, 181 n.31 (Miss. 2004), the supreme court, discussing the history of the wrongful death cause of action, recognized that our statute creates a new cause of action for wrongful death. It does not "cause to survive or to be revived the deceased's right of action, but enables designated members of his family to recover damages . . . ." *Thames v. State of Miss., ex rel. Shoemaker*, 117 F. 2d 949, 951 (5th Cir. 1941). Under our statute, no right to sue vests in the wrongful death beneficiaries until the death occurs; therefore, a wrongful death action cannot accrue prior to the death. What it is that accrues in favor of the wrongful death beneficiaries at the time of the death is a statutory right to sue for those claims which the decedent could have brought had death not ensued. Miss. Code Ann. § 11-7-13 (Rev. 2004). As *Jenkins* clarifies, if on the date the wrongful death suit was filed, a claim by the decedent, had he lived, would have been barred by the statute of limitations applicable to that claim, then the wrongful death claim is likewise time-barred. *Jenkins*, 933 So. 2d at 926 (¶12). This is consistent with the fact that, under the statute, a wrongful death claim is "derivative in nature, arising from and dependant upon the wrong done the (fatally) injured person." *Gentry*, 606 So. 2d at 1123 (Robertson, J., dissenting).

¶16. The principle that a wrongful death action does not accrue until the death means that no wrongful death action may be commenced for a death that is anticipated but has not yet occurred.

*In re Brantley v. Brantley*, 865 So. 2d 1126, 1131-32 (¶18) (Miss. 2004) (affirming the dismissal of a wrongful death claim because the person who was the subject of the action was still alive). Further, because an action for wrongful death does not accrue until death, we have held that "it is impossible for the deceased to assign any interest in the claim." *In re Estate of England*, 846 So. 2d 1060, 1070 (¶32) (Miss. Ct. App. 2003). In my opinion, to avoid fostering confusion in this area of law, the conceptual distinction between the commencement of the applicable limitations period for a wrongful death action and the date that the wrongful death action accrues must be preserved.

**KING, C.J., LEE AND MYERS, P.JJ., AND IRVING, J., JOIN THIS SPECIALLY CONCURRING OPINION.**